

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1082 OF 2004

Mohan Mhaloo Pankar .. Appellant
(Orig.Deft no.1)
V/s

1. Prabhakar Pandurang Thakur
2. Bhagwati Niketan Co
Op Hsg Scy Ltd.
3. Municipal Corporation
of Gr.Mumbai, Mumbai
4. R.M.Pankar
5. S.M.Pankar .. Respondents
(No.1 orig.plff and rest
deft nos.4,5,2 and 3)

Shri S.Y.Throat for Appellant
Shri A.N.Nesari with
Shri D.K.Damle, for Respondent no.1

CORAM:S.R.SATHE, J.

DATED:13th Feb. 2006w

JUDGMENT :-

1. By consent heard finally at the admission stage.

2. The Appellant original defendant no.1 in LC Suit No.2578 of 1983 has preferred this appeal against the judgment and order passed by the City Civil Court, Greater Bombay whereby the plaintiff's suit for permanent injunction was decreed in plaintiff's favour and defendant no.1 or defendant no.1 to 3 jointly were directed to get their title to the land in question perfected by obtaining sale deed from original owner and in turn to execute complete deed of conveyance in respect of the suit land along with building thereon in favour of defendant no.4 Co Op Hsg Scy and defendant no.5 Bombay Municipal Corporation was restrained to disburse the amount of compensation to the defendant nos.1 to 3. For the sake of convenience hereafter parties shall be referred to as the plaintiff and defendants.

3. The brief facts giving rise to this appeal are as under :-

. Plot No.177(2) Teli Galli Cross Road, Andheri (East), was initially owned by Narayan Racmahdnra Dev. He

executed an agreement in favour of A.R.Sharma, C.M.Shah, S.S.Singh as purchasers as second part and defendant nos.1 to 3 as sub purchasers of third part of the said agreement, on 20-10-1972. The defendant no.1 entered into an agreement with plaintiff on 16-10-1975 whereby plaintiff agreed to purchase residential flat bearing NO.23 in the building known as Bhagwati Niwas situated on the above mentioned land. As per the agreement plaintiff paid entire consideration amount to the defendant no.1 and took the possession of the flat. The other flat purchasers also paid their respective consideration to the defendant no.1 builder and secured the possession of their respective flats. Not only that but all the flat owners made payment to the defendant no.1 for registration of society, conveyance, insurance cover of the building, water and electricity meter charges etc. The defendant no.1 had obtained certificate of title on 22-12-1974 in respect the said land from M/s Ambubhai Diwanji, a solicitor company. The defendant nos.1 to 3 however failed to discharge their obligations cast on them under the provisions of Section 10 and 11 of the Maharashtra Ownership Flats Regulation of the Promotion of Construction, Sale, Management and Transfer Act, 1963 (hereafter referred to as the said Act). They failed to form a Co-operative Society under Section 10 of the said Act. As a result of the same the flat purchasers approached the

Registrar, Co operative Societies, for registration of the society and accordingly the Society was registered on 2-12-1978. Defendant nos.1 to 3 failed to complete their title deeds in respect of the land on which building is erected and consequently transfer the same in favour of the Society, The defendant nos.1 to 3 deliberately did not take proper steps with regard to the completion of the title deeds.

4. As some portion of the land mentioned above was coming within the Regular Line of public street the same was to be acquired by B.M.C., hence defendant no.5 issued notice to the defendant no.4 society and called upon them to prove within 7 days from receipt of the notice that the said plot of land vests in them and also informed that failing which the defendant no.5 would do correspondence with the builder. In fact in pursuance of the said notice the defendant no.5 demolished the compound wall of the society on 13-4-1983. The defendant no.5 informed the defendant no.4 that defendant nos.1 to 3 will claim compensation in respect of acquisition of the strip of land as they were in possession of the same. Plaintiffs came to know that in lieu of compensation the defendant nos 1 to 3 would acquire additional FSI. Thus, plaintiff informed that all the flat owners have paid the entire consideration and society is formed and thus the plaintiff and society

have become the beneficial owners of the land. But defendant nos.1 to 3 by not executing the deed of transfer, were depriving the society and its members the benefit of the said land. According to the plaintiff the defendant nos 1 to 3 were even not entitled to carry on any additional construction or to make alterations in the sanctioned plan of the building as plaintiff and all the members had not consented for such changes or alterations in the plan. As the defendant nos.1 to 3 failed to discharge their statutory obligations plaintiff filed the present suit against defendant nos.1 to 3 and prayed for mandatory injunction directing defendant nos.1 to 3 to take necessary steps and to execute conveyance in favour of the defendant no.4 and discharge their obligations under Section 11 of the said Act and for permanent injunction against defendant nos.1 to 3 restraining them from carrying out any additional constructions or making alterations in the initial plain approved by defendant no.5 or making use of any additional FSI which they may apply for or acquire as a result of acquisition of strips of land out of the suit property.

5. The defendant no.1 filed his written statement and opposed the suit claim on several grounds. Firstly, he contended that the suit filed by the plaintiff is in substance a suit between member and member and/or member

and the co operative housing society and as such the same is not maintainable in the City Civil Court, Bombay. Secondly, he contended that same is barred by law of limitation. Thirdly, the defendant took the contention that there was no necessity for the plaintiff to join B.M.C. as defendant no.4 in the present suit and the suit is bad for misjoinder of parties and causes of action. He also contended that the original owner did not execute the conveyance deed in favour of the defendant nos.1 to 3 and as such further conveyance in favour of the society could not be completed and as such the original owner ought to have been joined as a party and suit is bad for non joinder of necessary parties. The defendant also contended that the plaintiff is not having any independent right and as he is the member of the defendant no.4 housing society he is only an allottee of the flat subject to rules and regulations incorporated in bye laws of the defendant no.4 society and he has no independent right to file the present suit or to get any relief in favour of the defendant no. 4 society. According to the defendant no.1, society was in fact not interested in getting the conveyance executed in their favour though defendant nos.1 to 3 were ready for the same. It is his contention that even if the society is registered the provisions of Section 10 of the said Act do not in any way affect the rights of the builder to dispose of the remaining flats out of

the building and exploiting unutilised FSI even after the formation of the co operative housing society. Thus according to him it is only with a view to bring pressure on him and to grab compensation benefit plaintiff filed the present suit. Hence on all these grounds the defendant no.1 prayed for dismissal of the suit.

6. The defendant no.4 society filed their written statement and practically supported the case of the plaintiff. They also contended that the defendant no.1 has without any reason failed to discharge his statutory obligations and the society has not given consent to defendant no.1 to carry out any additional structure or alterations in the suit property. The defendant no.4 therefore prayed for dismissal of the suit.

7. The defendant no.5 filed its written statement and contended that the suit is bad for want of notice under Section 527 of the B.M.C. Act. The Corporation further contended that defendant no.1 informed them that he is builder and though he has sold the flats to the individual flat purchasers he has not transferred his rights in favour of Bhagwati Niketan Co operative Hsg Scy Ltd.. The defendant no.5 admitted that they have demolished the compound wall of the suit building after issuing notice to the society. Referring to the prayers

made by the plaintiff restraining them from giving any compensation for acquisition of the set back land and/or paying compensation for demolition of compound wall or grant of additional FSI in lieu of compensation to the defendant nos.1 to 3, the Corporation submitted to the orders of the Court. Thus the defendant no.5 prayed for dismissal of the suit.

8. On these pleadings the learned trial Judge framed issues and after considering the oral and documentary evidence adduced by the parties the trial Court came to the conclusion that defendant nos.1 to 3 without any reason failed to comply their statutory obligations under Sections 10 and 11 of the said Act and though actual sale deed or conveyance deed of the suit property is not executed in favour of the society, the defendant nos.1 to 3, builders, are not entitled to take any advantage of the same and get compensation of additional FSI in lieu of compensation. He also held that defendant nos.1 to 3 are also not entitled to carry out any additional structure or alterations and change the initial plan sanctioned by the defendant no.5. He therefore, decreed the suit in plaintiff's favour.

9. Being aggrieved by the said order the original defendant no.1 builder has filed the present appeal. In this appeal before me Shri S.Y. Thorat, learned

Advocate for the defendant no.1 has urged only 3 points, Firstly, he submitted that lower Court has wrongly held that the Civil Court had jurisdiction to try the suit. Secondly, he canvassed before me that the learned trial Judge ought to have held that the suit is bad for non joinder of necessary parties and misjoinder of causes of action. Lastly, he submitted that the plaintiff alone had no right to file the present suit. No individual right is accrued in his favour as the conveyance deed is not executed in favour of the Society. The Society is not entitled to claim any benefit arising out of the acquisition nor they can raise any objection for carrying out additional or new structure in the suit land. He, therefore, submitted that appeal be allowed and the order of the trial Court be set aside and the plaintiff's suit be dismissed.

10. As against this Shri A.S.Nesari, learned Advocate for Respondent nos.1 and 2 i.e. original plaintiff and defendant no.4 supported the judgment and order passed by the trial Court.

11. It is not in dispute that by an agreement for sale dated 28-10-1972 made between Narayan Ramchandra Dev vendor of the first part, A.R.Shah, S.M.Shah and S.S.Sing as purchasers of the second part and defendant nos.1 to 3 as sub purchasers of third part, the Vendor

therein agreed to sell to the suit land and consequently the defendant nos.1 to 3 were put in possession and then defendant no.1 as a builder carried out the construction of 5 storied building on the said land and flats out of the said building were sold to different persons including plaintiff. It is also an admitted fact that the flat purchasers formed defendant no.4 society and accordingly it was registered on 7-12-1978. Thus plaintiff has become a member of the said society.

12. The first and foremost objection of the defendant no.1 to the present suit is that the suit is pertaining to the dispute between a member and member and/or a member and cooperative society. According to him the defendant no.1 is also having one flat in the said building. So, it can be said that there is a dispute between member and a member or between a member and the co-operative Society. The learned Advocate for the defendant no.1 submitted that the present suit is in respect of a dispute contemplated under Section 91 of the Maharashtra Co operative Societies Act 1960 and as such City Civil Court, Bombay has no jurisdiction. In order to find out whether there is any substance in this argument it is necessary to see whether grievance made by the plaintiff can be said to be dispute arising between member and member of a co-operative society or between member and Society, it is necessary to see the

averments in the plaint and find out as to what in substance the plaintiff has asked for. From the bear reading of the plaint it is very clear that the plaintiff is not seeking any relief against the defendant no.1. He, i.e. defendant no.1 is a member of the co operative society is only a mere co-incidence. So, the learned trial Judge has rightly held that this is not a dispute between two members of the co operative society.

13. The main grievance of the plaintiff is that the defendant no.1 as a builder was under statutory obligations to discharge his duties as per the provisions of Sections 10 and 11 of the said Act and with a view to grab advantage of non registration of the society, the defendant no.1 deliberately did not take steps to register the society and even to get the conveyance completed in favour of the Society. So, in order to compel the defendant no.1 to fulfil his statutory obligations in pursuance of the agreement executed between the plaintiff i.e. flat owners and the builder i.e. defendant no.1, plaintiff has filed the present suit. The plaintiff has not asked the defendant no.4 housing society to do any particular thing and plaintiff is in fact not claiming any relief against defendant no.4 society. So, under such circumstances the learned trial Judge has rightly held that this is

not a suit between the member and co operative society and as such the provisions of Section 91 of Maharashtra Co operative Hsg Society Act 1960 are not applicable City Civil Court has jurisdiction.

14. It is an admitted fact that an agreement has been executed between the plaintiff and defendant no.1 on 16-10-1975. Said agreement is subject to the provisions of the said Act and the Maharashtra Ownerships of Flats Rules 1964. It is plaintiff case that defendant nos 1 to 3 have failed to discharge their duties as per Sections 10 and 11 of the said Act. It is therefore, necessary to see what said Sections say. The same read as under :

10.Promoter to take steps for formation of co operative society or company

1. As soon as a minimum number of persons required to form a Co operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a Co operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not

been taken, in such application for membership of a co-operative society or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.

(2) If any property consisting of building or buildings is constructed or to be constructed and the promoter submits such property to the provisions of the Maharashtra apartment Ownership Act, 1970, by executing and registering a Declaration as provided by that Act then the promoter shall inform the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960, accordingly; and in such cases, it shall not be lawful to form any co-operative society or company.

(11) Promoter to convey title, etc. and execute documents, according to agreement.

A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co operative society or as a company as aforesaid, or to an

association of flat takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefore in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

15. It would also be worthwhile to see what Rule 9 of the Maharashtra Ownership flats Rules 1964 says. It runs as follows :-

9. Period for conveyance of title of promoter to organisation of Flat purchasers.

If no period for conveying the title of the promoter to the organisation of the flat purchasers is agreed upon, the promoter shall subject to his right to dispose of the remaining flats, if any execute the conveyance within four months from the date on which co operative society or the company is registered or, as the case may be, the association of flat takers is duly constituted.

When a promoter has submitted his property to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering a Declaration as required by section 2 of that Act, and no period for conveying the title of the promoter in respect of the apartment to each apartment taker is agreed upon, the promoter shall execute the conveyance or deed of apartment in favour of each apartment taker within four months from the date the apartment taker has entered into possession of his apartment.

So, it is very clear that in view of the above legal provisions it was in fact necessary for the defendant nos.1 to 3 to take necessary steps for formation of the Co-operative housing society. It is plaintiff's case that defendants did not take such steps. No doubt it is the contention of the defendants that they had taken steps but the flat purchasers did not co-operate and as such they could not form the society and ultimately the flat purchasers formed a co-operative housing society and the same has been registered. The trial Court has rightly observed that the defendant nos.1 to 3 have not adduced any convincing evidence to show that flat purchasers did not co-operate and as a result of the

same defendant nos.1 to 3 could not form the society within statutory period. So, one thing is certainly clear that defendant nos.1 to 3 had failed to discharge their statutory obligations under Section 10 of the said Act.

16. It is the case of the plaintiff that defendants did not execute the sale deed in favour of the society. In fact they did not get their title perfected by getting the sale deed executed from the initial owner of the property and consequently they also did not execute the deed of transfer. The defendant nos.1 to 3 are now trying to take advantage by contending that the original owner and after his death his legal heirs have in fact not executed a deed of conveyance in their favour and as such they failed to complete their obligations under Section 11 of the said Act. However, besides the interested word of the defendants there is in fact no material on record which would indicate that defendant nos.1 to 3 had in fact made any genuine efforts to get the conveyance deed executed and registered. If really the defendant nos.1 to 3 had genuine desire to discharge their statutory obligations they would have taken all necessary steps against real owner and would have even filed suit and persuaded his legal heirs. But no such thing has happened. So, the learned trial Judge is justified in holding that defendant nos.1 to 3 have

failed to discharge their statutory obligations as per Section 11 of the said Act.

17. the learned Advocate for the defendant no.1 strongly argued before me that as a result of clause no.9 of the agreement executed between the plaintiff and defendant nos.1 to 3 the property in question still vests in defendant no.1 and naturally he is entitled to get any compensation arising out of acquisition of strip of land out of the suit property by the Corporation or he is entitled to get benefit arising out of such acquisition. Not only that but according to him the defendant no.1 is entitled to carry out additional structure or alterations in the suit building and for that matter they can do necessary changes in the initial plan.

. In order to find out whether there is any substance in this argument it would be worthwhile to see Clauses 9 to 11 of the agreement.

"(9) The Builder shall have right to make additions, raise storeys or put up additional structures which shall be the sole property of the Builder who will be entitled to dispose them off in such manner as he may deem fit and the Purchaser hereby give his/her their consent

to the same. The Builder reserves his right to put on any additional floors in case there is any relaxation in the increase of floor space index irrespective of the conveyance and assignments being executed or otherwise. The Builder has further informed Purchaser that he has provided additional strengthening to the structure of the building and no compensation shall be paid to the Co operative Housing Society limited or the Limited company (as the case may be) at the time of or thereafter for putting up additional floors. The Builder shall appropriate towards himself the proceedings of such additional sale of the floor space index. The Purchaser further agree/s that as a member of the proposed Co operative Housing Society Limited or the Limited Company (as the case may be) he/she/they will vote at a meeting of the Co operative Housing Society Limited or the Limited company (as the case may be) in favour of the purchasers of such flats and/or garages which may be constructed in respect of the said additional floor space index that may be available to the Builder. All the members of the Co operative Housing Society Limited or the Limited Company (as the case may be) enroll him

as an ordinary member of their Society and shall allot him such Flat or Garages which may be sold to him by the Builder.

(a) Purchaser shall not under any circumstances make any changes/alterations in his/her/their flat and garage other than plans already submitted and sanctioned by the Bombay Municipal Corporation. The Flat and Garage Purchaser would be free to make any changes in their respective flats and garages only after taking possession of the Flat and Garage provided such changes are made in accordance with the Bombay Municipal bye/laws.

10) The Purchaser shall have no claim save and except in respect of the said Flat/Garage hereby agreed to be acquired by him/her/them. All open spaces, parking places, lobbies, staircases, lifts, etc. will remain to be the property of the Builder until the whole property is transferred to the proposed Co operative Housing Society or Limited company as hereinafter mentioned, but subject to the rights of the Builders as mentioned in Clause 11 herein.

11) PROVIDED the Builder does not in any way affect or prejudice the right hereby granted in favour of the Purchaser, the Builder shall at liberty to sell, assign or otherwise deal with or dispose off their right, title and interest in the said land, hereditaments and premises and the Building constructed or hereinafter to be erected thereon".

18. In view of the above clauses the question arises as to what was the duty of the defendants nos.1 to 3 regarding execution of the sale deed or conveyance deed in favour of the Society. When it was to be executed? When there is nothing in the agreement in question suggesting as to when the builder promoter in the instant case should execute the conveyance deed and transfer the land in favour of the defendant no.4 reference can be made to clause 34 of the said agreement which runs as follows :-

34. After the building is complete and ready and fit for occupation and after the Co operative Housing Society Limited or Limited Company is incorporated, or registered and strictly complying with all the terms and conditions of their respective Agreements with the Builder and only after all the

flats/garages in the said Building have been sold and disposed off by the Builder and after the Builder has received all his dues payable to him under the terms of this Agreement, from all the purchasers of flats/garages, the Builder will arrange to convey/assign and transfer the land and building both in favour of such Co-operative Housing Society Limited or Limited Company as the case may be.

19. Now in the instant case the plaintiff as well as the defendant no.4 Co operative Housing Society which has come into existence have stated that consideration of all the flats as well as additional charges with regard to certain other amenities and facilities provided have been paid by all the flat purchasers to the builder. It is true that they could not adduce any specific evidence to show that each and every member has paid all the dues. However, it must be note here that defendant nos.1 to 3 have utterly failed to show that amount of consideration or other dues have not been paid by all the flat purchasers. Nor the defendant nos.1 to 3 have adduced any evidence to show that all the flats in the building in question have not been sold and disposed of. When such is the position as per clause 34 mentioned above, the defendant nos.1 to 3 were under an obligation to complete the conveyance deed.

20. So, merely because of the fact that there is no sufficient evidence to show that plaintiff and defendant no.4 were insisting the defendant nos.1 to 3 to execute the sale deed we cannot jump to the conclusion that they were not ready and willing to get the sale deed executed. By no stretch of imagination we can say that any flat owner would not be interested in getting the conveyance deed executed particularly when they have paid all the consideration of flat as well as other charges including registration fees etc. In fact, it is common experience that in many such cases the sale deeds are not executed in favour of the Society and some times some builders try to take advantage of this situation. This happens only because the flat owners cannot fight with the builder because of want of time, money, energy and courage and some times due to lack of unity amongst members. It is needless to say that when the builder promoter has failed to discharge his statutory as well as contractual duties and as a result of the same the conveyance deed is not executed in favour of the society or flat owners, the builder promoter cannot take advantage of his own wrong or fraud. It appears that here the real beneficial owners who are entitled for all benefits which normally they would received if conveyance deed would have been executed in their favour are deprived of the said benefits because of non

execution of the documents defendant nos.1 to 3. In such situation the builder promoter cannot be allowed to take advantage of any particular technical clause in the agreement. The learned trial Judge has also rightly held that in the instant case flats or property is principally transferred but only execution of legal consequence has remained. So, under such circumstances the plaintiff has rightly claimed that it is necessary to direct the defendant nos.1 to 3 to comply their statutory obligations under Section 11 of the said Act.

21. It has come on record that in the instant case the Auditor, Co Operative Society, Bombay had in fact issued show cause notice to the defendant no.1 and called upon him to explain as to why he did not discharge his duties as per the provisions under Section 11 and Rule 9 of the said Act. So, merely because the conveyance is not executed in favour of the defendants no.4 society the defendant nos.1 to 3 cannot be allowed to take advantage of the same and seek the compensation or secure additional FSI in lieu of compensation or to carry out additional structure in the said property. Allowing them to do so would in fact amount to putting premium on their own wrong and statutory default. So, considering this aspect, it must be held that the learned trial Judge has rightly directed the defendant nos.1 to 3 to complete the conveyance in favour of defendant no.4 and

restrained the Corporation from disbursing amount of compensation to defendant nos.1 to 3 or allotting them additional FSI. As the relief claimed against Corporation is only arising as a result of failure of discharging statutory duties by defendant nos.1 to 3, the plaintiff was required to implead Bombay Municipal Corporation as defendant no.5 in the present suit. So, by no stretch of imagination it can be said that the suit is bad for misjoinder of causes of action.

22. In view of the above, I have no hesitation to hold that the learned trial Judge has rightly considered all the facts and circumstances and the legal position and correctly decreed the suit. There is no necessity to interfere with the said order. Hence the appeal is dismissed.

. The Appellant to pay cost of Rs.5,000/- to the Respondent no.1.

(S.R.SATHE, J.)